UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date
November 9, 2000, at 10:00 a.m.

In re	:	
	:	Chapter 11
RANDALL'S ISLAND FAMILY GOLF	:	Case Nos. 00-41065 (SMB)
CENTERS, INC., *et al.*,	:	through 00-41196 (SMB)
	:	(Jointly Administered)
Debtors.	:	

LIMITED OBJECTION OF IRVIN AND EVELYN DEGGELLER, IRVIN DEGGELLER REVOCABLE TRUST OF 1994, AND EVELYN DEGGELLER REVOCABLE TRUST OF 1994 TO NOTICE OF PROPOSED ASSIGNMENT OF LEASE AND STATEMENT OF CURE AMOUNTS

TO THE HONORABLE STUART M. BERNSTEIN,
UNITED STATES BANKRUPTCY JUDGE:

Irvin and Evelyn Deggeller, individually and as trustees of the Irvin Deggeller Revocable Trust of 1994 and the Evelyn Deggeller Revocable Trust of 1994 (collectively, "Landlord"), by their attorneys, Robinson Brog Leinwand Greene Genovese & Gluck PC, object to the *Notice of Proposed Assignment of Lease and Statement of Cure Amounts* (the "Notice") dated October 19, 2000, and served upon them by the Debtors.[1] Landlord seeks the entry of an order denying the Motion with respect to the proposed assignment by the debtor, Blue Eagle of Florida, Inc. (the "Debtor") to Klak

[1] To the extent applicable, Landlord incorporates herein by reference its Objection filed on July 28, 2000 (docket no. 211) and its Supplemental Objection filed on August 11, 2000 (docket no. 240) (collectively the "Objection"), to the Debtors' *Motion for Orders Pursuant to Sections 105, 363 and 1146 of the Banrkuptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 6007 (i)(A) Authorizing and Approving (i) Sale of Certain FeeOwned Properties, (ii) Assumption, Sale and Assignment of Certain Leasehold Interests, and (iii) Sale of Related Personal Property, Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from any Stamp, transfer, Recording or Similar Tax, (B) Approving Certain Sale Procedures to be Used in Connection with Such Sales, (C) Approving the Form of Sale and Assignment Agreements, (D) Authorizing the Payment of Brokers' Fees in connection with Such Sales, (II) in the Event that Properties Remain Unsold at the Conclusion of the Omnibus Sale Hearing, Authorizing and Approving the Abandonment of Unsold FeeOwned Properties and the Rejection of Unsold Leasehold Interests, and (III) Scheduling an Expedited Hearing to Consider Shortenign the Time for, Fixing the Date, Time and Place for, and Approving the Form and Manner of Notice and Hearing on Such Sales* (the "Motion")

Golf Prime, L.L.C. ("Klak Prime") of the Debtor's interest in a certain unexpired lease of non-residential real property from Landlord; *provided, however,* that Landlord will not object to the assignment if Landlord receives (i) cure of existing monetary defaults, (ii) adequate assurance of future performance, and (iii) a deposit or other security for the performance of the lease obligations substantially the same as would be required by Landlord upon the initial leasing to a similar tenant. In support thereof, Landlord states:

PRELIMINARY STATEMENT

1. The *sine qua non* for assumption and assignment of an unexpired lease pursuant to section 365 of title 11 of the United States Code (the "Bankruptcy Code") is the cure of any outstanding defaults, and the provision of adequate assurance of future performance.

2. The Debtors have failed to provide Landlord with any form of assurance of future performance. At best, the Debtors have provided Landlord with financial information, concerning one of five equity holders of the equity holder of Klak Prime. However, there is no indication that such entities are assuming any liability for the lease obligations that are to be assigned to Klak Prime. The financial health of such entities is therefore irrelevant to the proposed assignment.

3. The only information provided to Landlord strongly suggests that Klak Prime is a bankruptcy remote entity created to shield its equity holders from liability for the lease obligations that they seek to assume. Absolutely no information concerning the financial health of Klak Prime has been provided. Accordingly, Landlord can not determine what provision, if any, has been made to adequately assure future performance of the lease obligations that are to be assigned to Klak.

4. Landlord also objects to the statement of cure amount as stated by the Debtor. The Debtor's statement of cure amount fails to take into account year 2000 real property taxes and legal fees reasonably incurred by the Landlord in connection with this case. Such fees exceed $5,920.00 and must be satisfied in connection with the proposed assignment.

5. Finally, pursuant to section 365(l) of the Bankruptcy Code, Landlord is entitled to a deposit or other security for the performance of the lease obligations substantially the same as would have been required by Landlord upon the initial leasing to a similar tenant. Coupled with the requirement of adequate assurance of future performance, Landlord requires a guaranty from a financially responsible party, of Klak Prime's obligations under the lease.

BACKGROUND

THE DEBTOR

6. The Debtor is a Delaware corporation doing business at 225 Broadhollow Road, Suite 106E, Melville, New York 11747.

THE LEASE

7. On or about July 26, 1997, Landlord, as landlord, and the Debtor, as tenant, entered into an *Agreement of Lease* (the "Lease") with respect to certain real and personal property, including a nine-hole, par 3 golf course located located in the town of Stuart, Martin County, Florida and more particularly described in the Lease (the "Golf Course").

THE BANKRUPTCY CASE

8. On May 4, 2000, the Debtor commenced this case under chapter 11 of the Bankruptcy Code by filing a voluntary petition for relief with this Court.

9. No trustee or examiner has been appointed. A committee of creditors has been appointed and has retained counsesl.

THE MOTION

10. On July 19, 2000, the Debtor and its affiliates (the "Debtors") filed the Motion and scheduled a hearing to be held on July 31, 2000, to consider the approval of auction procedures as well as the sale, by public auction, of the Debtor's interests in certain owned and/or leased properties including the Golf Course (the "Sale Properties").

11. As set forth in more detail in the Objection, Landlord objected to the proposed sale procedures upon the ground that they failed to afford Landlord sufficient notice or opportunity to protect and defend its rights pursuant to, *inter alia*, section 365 of the Bankruptcy Code. The Objection focussed on the need for Landlord to receive timely information concerning the proposed cure of any outstanding defaults, and the provision of adequate assurance of future performance.

12. Landlord incorporates the Objection herein for all purposes.

13. At the July 31, 2000, hearing, the Debtor announced that it would not go forward with the proposed auction sale of the Sale Properties.

14. Instead, the Debtor announced that it had reached substantial agreement with Klak for the sale by the Debtors and the purchase by Klak, of substantially all of the Sale Properties, including, with respect to leased properties such as the Golf Course, the right to designate the party to whom such leases would be sold and assigned by the Debtors. The hearing was adjourned to August 31, 2000, while the Debtors and Klak finalized the terms of their agreement.

KLAK AND KLAK PRIME

15. Klak is a limited liability company, incorporated in Delaware. Upon information and belief the ownership of Klak is split among five entites: Lubert-Adler Real Estate Fund II, L.P, Lubert-Adler Real Estate Parallel Fund II, L.P., and Lubert-Adler Capital Real Estate Fund, II (collectively, "Lubert Adler"), Klaff Realty LP ("Klaff") and Kemper Sports Management ("Kemper").

16. As set forth in a letter dated October 26, 2000, Klak Prime is a wholly owned subsidiary of Klak. It appears that the Debtor seeks to assume and assign ten leases (including the Lease) to Klak Prime.

THE NOTICE

17. By letter dated October 19, 2000, the Debtor gave Landlord *Notice of Proposed Assignment of Lease and Statement of Cure Amounts* pursuant to which the Debtors' stated that they intended to assume the Lease and assign it to Klak Prime.

FINANCIAL INFORMATION

18. The Debtors have failed to provide any *pro forma* financial information concerning Klak Prime, so Landlord can not determine whether Klak has any assets at all.

19. Instead, on or about August 7, 2000, the Debtor provided counsel with a packet of "information" consisting of : (i) a report on the audited financial statements of Lubert-Adler, (ii) a corporate profile of Klaff, and (iii) a corporate profile of Kemper.

20. The "so-called" corporate profiles consist almost entirely of "fluff pieces" i.e. copies of magazine articles and brochures regarding the corporate equity holders of the corporate parent of

Klak Prime. None of these provide economic information. from which Landlord can determine whether adequate assurance can be provided by Klak Prime. For that matter, these documents do not provide sufficient information to determine what would constitute adequate assurance with respect to the equity holders.

21. The "so-called" audited financials of Lubert-Adler do not contain the signature or even the name of the accountant or accounting firm that prepared them. Such documents would not be admissible as evidence of Lubert-Adler's ability to provide adequate assurance. They are certainly not admissable as evidence of the financial health of an entity that is a subsidiary of a company of which Lubert-Adler is only part owner.

22. The aforementioned documents do not satisfy the adequate assurance requirements of the Bankruptcy Code, because the financial wherewithal of Kemper, Klaff and Lubert-Adler is NOT at issue in this case. Nothing submitted by the Debtor suggests that any of Klak's equity holders has any obligation to fund any amounts due to Landlord to cure existing defaults or provide adequate assurance with respect to the prompt cure of furure defaults.

23. The Debtors have failed to provide parties with a copy of the Operating Agreement for Klak (or any other agreement), from which parties may determine whether Lubert-Adler, Klaff and Kemper have any obligation to satisfy shortfalls suffered by Klak or its subsidiaries with respect to adequate assurance.

24. The Debtors have failed to provide parties with a copy of the Operating Agreement for Klak Prime (or any other agreement), from which parties may determine whether any provision has been made for addressing a shortfall in its financial ability to meet its obligations.

25. To the extent that an assignment to Klak is sought, then Landlord objects to such assignment until the Debtor satisfies its burden of proving either that (i) Klak Prime, as opposed to its individual equity holders, or their equity holders, can provide adequate assurance of future performance, or (ii) the Debtor provides a guaranty or some other security from such of Klak Prime's equity holders as can provide adequate assurance of future performance.

EXISTING DEFAULTS

26. The Debtor is currently in arrears in the approximate amount of $86,006.79 on account of (i) unpaid 1999 real property taxes $37,062.89), (ii) unpaid 2000 real property taxes ($42,217.45), (iii) unpaid rent for the period May 1 through May 3, 2000 ($806.45), and (5) legal fees incurred by Landlord in connection with this case in excess of $5,920.00.

27. Accordingly, Landlord objects to the *Notice of Proposed Assignment and Statement of Cure Amounts* to the extent the Debtors' seek to limit the cure amount to $37,869.34.

DISCUSSION

28. Landlord objects to the relief requested by the Debtors to the extent that such relief deprives Landlord of its right to receive (i) the cure or the adequate assurance of the prompt cure of presently existing defaults, (ii) compensation for or adequate assurance of compensation for actual pecuniary loss resulting from existing defaults, and (iii) adequate assurance of future performance under the Lease. Satisfaction of these rights is a condition precedent to approval of the Motion. 11 U.S.C. §§ 365(b)(1), 365(b)(3), 365(l); *cf. In re Wingspread Corp.*, 116 B.R. 915 (Bankr. S.D.N.Y. 1990).

CURE AND ADEQUATE ASSURANCE OF FUTURE PERFORMANCE

29. An intended assignee must demonstrate that it has the ability to satisfy the financial obligations imposed by the Lease. *See In re Lafayette Radio Electronics Corp.*, 9 B.R. 993 (Bankr. E.D.N.Y. 1981); *In re Bygaph, Inc.*, 56 B.R. 596 (Bankr. S.D.N.Y. 1986); *In re Evelyn Byrnes, Inc.*, 32 B.R. 825 (Bankr. S.D.N.Y. 1983). Unless and until such assurances are provided and are determined to be adequate, the assumption and assignment of the Lease is prohibited. 11 U.S.C. § 365(b).

30. As set forth above, neither the Debtors, nor Klak Prime, have provided Landlord with a balance sheet, past credit history, a pro forma or any other financial information concerning Klak Prime. What has been provided to Landlord is unsigned financial statements for one of the equity holders of the equity holder of Klak Prime and copies of magazine articles and brochures regarding certain other equity holders of the equity holder of Klak Prime. Because it does not appear that the equity holders are assuming any obligation to Landlord, their financial health is irrelevant to the Motion. It is Klak Prime's ability to perform that is in question, not the equity holders of its equity holder.[2]

31. Landlord is entitled to adequate assurance of future performance under the terms of the Lease. As of this writing, no such assurance has been provided, and the debtor's have not produced evidence with respect thereto. Additionally, pursuant to section 365(l) of the Bankruptcy Code, Landlord is entitled to receive a deposit or other security for the performance of the lease

[2] Obviously, if one or more of Klak's equity holders guaranties Klak's obligation under the Lease, such entity's finanical wherewithal becomes relevant.

obligations substantially the same as would have been required by Landlord upon the initial leasing to a similar tenant.

32. Accordingly, Landlord believes it should receive either a guaranty or other secured obligation from Klaff, Kember or Albert-Lubin in support of the proposed assignment.

CURE OF EXISTING DEFAULTS

33. The Bankruptcy Code provides that before a debtor may assume or assign a lease it must cure existing defaults or provide adequate assurance that existing defaults will promptly be cured. 11 U.S.C. § 365(b)(1)(A). The Debtor has proposed to fix the cure amount at $37,869.34, representing (i) rent from May 1 - 3, 2000, and (ii) 1999 real estate taxes in the amount of $37,062.89.

34. The actual cure amount is somewhat greater.

35. The Debtor has failed to pay rent for the period May 1 to May 3, 2000, in the amount of $806.45.

36. The Debtor failed to pay 1999 real property taxes aggregating $37,062.89 as of November 1, 2000.

37. The Debtor has also failed to pay year 2000 real property taxes in the aggregate amount of $42,217.45 as of November 2000.

38. Finally, Landlord has incurred legal fees and expenses in connection with this case for which it is entitled to reimbursement pursuant to the terms of the Lease. Through November 1, 2000, such fees and expenses aggregate in excess of $5,920.00.

39. Accordingly, the Debtor can not cure, and therefore can not assume and assign, the Lease unless it satisfies its obligations with respect to the May 2000 rent, the 1999 real property taxes, the 2000 real property taxes and the legal fees and expenses in the aggregate amount of $86,006.79 as of November 1, 2000.

CONCLUSION

WHEREFORE, Landlord seeks the entry of an order denying the Motion and granting such other and further relief as is just and appropriate.

Dated: New York, New York
November 1, 2000

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By: /s/ Michael S. Schreiber
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